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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 16

BANCO NACIONAL DE CUBA,

Petitioner,

v.

PETER L. F. SABBATINO, as Receiver and F. SHELTON FARR, WILLIAM F. PRESCOTT, EMMET WHITLOCK, LAWRENCE H. DIXON, H. BARTOW FARR, ELIZABETH C. PRESCOTT, FABIO FREYRE and HELEN G. DOWNS, co-partners doing business as FARR, WHITLOCK & CO.

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE*

The American Bar Association files this brief *amicus curiae* pursuant to the written consents of the parties hereto, which are on file with the Court.

Interest of *Amicus Curiae*

The basic principles of international law involved in this case are of vital concern to the American Bar Association and its more than 114,000 members. As a national

professional association of lawyers dedicated "to advance the science of jurisprudence" and "to apply its knowledge and experience in the field of law to the promotion of the public good," the Association is interested in presenting to the Court its views on fundamental tenets of the law of nations applicable to the protection of property of foreigners. The Association wishes to set forth its reasons, both of authority and policy, for respectfully urging the Court to affirm the vitality of these principles of international law and to determine that they have been violated by the government of Cuba in this case.

Question Presented

The brief of the American Bar Association will discuss the following question:

Did the action of the government of Cuba in expropriating without prompt, adequate and effective compensation, for a retaliatory purpose, and on a discriminatory basis, the properties in Cuba of a company incorporated in Cuba in which United States nationals had a dominant interest, violate international law?

Statement

The Board of Governors of the American Bar Association has authorized the submission of a brief on behalf of the Association, as *amicus curiae*, limited to the question set forth above. Accordingly, this statement will be limited to the presentation of the facts of the case as they relate to the asserted violation by the Cuban government of international law.

On August 6, 1960, the Prime Minister and the President of Cuba, pursuant to Cuban law No. 851 of July 6, 1960 issued a decree nationalizing through compulsory expro-

priation the property within Cuba of twenty-six companies, doing business in Cuba, in which nationals of the United States have important interests. Compania Azucarera Vertientes-Camaguey de Cuba (hereafter "C.A.V.") was listed in the decree as one of these companies. This case involves the validity under international law of the expropriation decree as applied to property of C.A.V. located in Cuba at the time of the decree.

In its decision of March 31, 1961, the District Court (Dimock, J.) held that the Cuban expropriation decree pursuant to Law No. 851 violated international law in three separate respects: (1) It was not reasonably related to a public purpose involving the use of the expropriated property, but was in retaliation for acts by the United States government; (2) it discriminated against United States nationals; and (3) it did not provide adequate compensation for the taking of the properties. 193 F. Supp. 375 (S.D.N.Y. 1961). The Court of Appeals for the Second Circuit in its July 6, 1962, decision declined to find three independent violations of international law, limiting itself to the holding that since the Cuban decree of expropriation not only failed to provide adequate compensation, but also involved a retaliatory purpose and a discrimination against United States nationals, it violated international law. 307 F. 2d 845 (2d Cir. 1962).

Introduction and Summary of Argument

For the purposes of this brief it is assumed that the Supreme Court, like the courts below, will not regard itself as barred by the act of state doctrine from considering the asserted violations of international law involved in this case. The applicability or inapplicability of said doctrine, and any exceptions thereto, to the facts of the present case are discussed at length in the briefs of the parties and other *amici curiae*, some of which have devoted their entire argument to this doctrine.

Assuming the inapplicability of the act of state doctrine, the Court's competence and indeed duty to ascertain the applicable international law principles and determine this case on the basis of the principles so ascertained is both long established and an immediate imperative.

As far back as 1815, Chief Justice Marshall laid down the basic guide line that "the Court is bound by the law of nations, which is a part of the law of the land". *The Nereide*, 13 U. S. (9 Cranch) 388, 423. However, it was Justice Gray who in 1900 gave classic formulation to this fundamental proposition in *The Paquete Habana*, 175 U. S. 677, 700:

> "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."

See also *Ex Parte Quirin*, 317 U. S. 1, 29.

The desirability of the courts of this country, today more than ever the repositories of the tradition of the role of law in the resolution of political and social conflict, applying international law has been well expressed by the American international law scholar and diplomatist who is now a Judge of the International Court of Justice:

> "[T]he courts of the United States could make a more significant contribution to the development of the rule of law among nations, which, as we have seen, is standard policy of the United States as well as a desideratum in the minds of all men of good will. If the courts of the leading power of the free world support by their silence or by their jurisprudential verbiage the notion that there is no international law, they certainly lend no support to the Department of State when it seeks to protect American interests abroad." Jessup, The Use of International Law 85 (1959).

Viewed from an international law perspective, and framed in terms of the sole question here considered of whether or not international law has been violated, the fact that a Cuban act of state is involved is no defense and, is in fact, the starting point of the inquiry. The Permanent Court of International Justice, the predecessor of the present International Court of Justice, has unequivocally stated that the acts of administrative, judicial or legislative organs of a State constitute no defense to the State's breach of international law, and that municipal law cannot prevail over international law. *German Interests in Polish Upper Silesia (Merits)*, P.C.I.J., Ser. A, No. 7, at 21-24, 42, 46 (1926); *Factory at Chorzów (Jurisdiction)*, P.C.I.J., Ser. A, No. 9, at 27 (1927); *Factory at Chorzów (Merits)*, P.C.I.J., Ser. A, No. 17, at 33 (1928); *Free Zones of Upper Savoy and the District of Gex*, P.C.I.J., Ser. A, No. 24, at 12 (1932); *Greco-Bulgarian Communities*, P.C.I.J., Ser. B, No. 17, at 32 (1930).[1]

Petitioner urges in this Court that the lower courts erred in finding as a matter of fact that the Cuban decree and law under which C.A.V.'s property was seized were discriminatory, retaliatory, and confiscatory. Petitioner argues further, that even if the Cuban measures were discriminatory, retaliatory, and confiscatory, the courts below erred in holding that such measures violated international law. (Brief for Petitioner, pp. 38-51.)

As it is the established rule of this Court that it will accept the findings of fact in which two federal courts concur unless clear error is shown, *Stuart* v. *Hayden*, 169 U. S. 1, 14; *Texas & Pac. Ry.* v. *Railroad Comm'n*, 232 U. S. 338; *Texas & N.O.R.R.* v. *Brotherhood of Ry. & S. S. Clerks*, 281 U. S. 548, 558; *United States* v. *Commercial Credit Co.*, 286 U. S. 63, 67; *Continental Ill. Nat. Bank*

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[1] See 1 Schwarzenberger, International Law 68-70 (3d ed. 1957).

& Trust Co. v. *Chicago, R. I. & Pac. Ry.*, 294 U. S. 648, 678; *Pick Mfg. Co.* v. *General Motors Corp.*, 299 U. S. 3, and as the District Court and the Court of Appeals are clearly correct in their concurrence that C.A.V.'s property was taken by virtue of Cuban legislation in fact discriminatory, retaliatory, and confiscatory, this brief will be concerned with showing that the courts below correctly stated and applied substantive rules of international law when they held that Cuba's seizure of C.A.V.'s property was an internationally illegal act.

Petitioner has also urged that no international law question is involved since C.A.V. was a Cuban corporation. (Brief for Petitioner, pp. 27-34.) This brief shows that a State is responsible under international law for action against a domestic corporation in which alien stockholders own a significant interest where the same action would be internationally wrongful if taken directly against an alien.

ARGUMENT

I. The expropriation decree violated international law because, for retaliatory purposes, it wrongfully discriminated against nationals of one particular foreign country.

The Court of Appeals, in deciding that it is a violation of international law for a country to fail to pay adequate compensation for the property it takes from a particular class of aliens, when the purpose of the taking is to retaliate against the homeland of these aliens and when the result of such seizure is to discriminate against them only, was careful to note that the retaliatory purpose and discriminatory operation were closely related features of the Cuban law and decree. This relationship should be borne in mind when "retaliatory purpose" and "discriminatory operation" are discussed herein *seriatim*.

a. The expropriation decree was retaliatory.

It is clear that under international law "public purpose" conditions the exercise of a State's power to expropriate alien property.[2] It is equally clear that State confiscations of particular foreign-owned enterprises, done in peacetime as acts of reprisal against the country of those aliens, are not takings carried out for a valid public purpose. The Committee on Nationalization of Property, of the American Branch of the International Law Association has said: "'[U]nder International law, a state may not take foreign interests as a measure of political reprisal." Proceedings and Committee Reports of the

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[2] In *Walter Fletcher Smith* (United States v. Cuba), 2 U. N. Rep. Int'l Arb. Awards 915 (1929), the arbitrator concluded that "the expropriation proceedings were not, in good faith, for the purpose of public utility," and he held that the "acts of expropriation . . . were not of such a character as to give an indefeasible title to the defendant company." In the *Norwegian Shipowners' Claims* (Norway v. United States), 1 U. N. Rep. Int'l Arb. Awards 307 (1922), the international tribunal noted that the law of the United States, which prohibits the taking of private property for public use without just compensation, was in accord with the international public law of all civilized countries, and that courts of the United States and of other countries too, required to resolve a conflict between respect for private property and the power of a sovereign State to expropriate, must settle among other questions "whether the 'taking' is justified by public needs." *Id.* at 332. The tribunal was of the opinion that "whatever may be said in favour of the taking for title of the claimants' property during the war, there was no sufficient reason for keeping these ships after the signature of the Versailles Treaty in June 1919," *id.* at 329, and it went on to hold that, as the United States had not proved to it that keeping title to the claimants' property was needed for public use after that time, enhanced damages should be awarded for subsequent wrongful detention of the ships.

The "public purpose" principle is also incorporated in the Harvard Law School Draft Convention on the International Responsibility of States for Injuries to Aliens, article 10, subparagraph 1(a) (Draft No. 12, 1961), reprinted in Sohn & Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 Am. J. Int'l L. 545, 553 (1961), and the American Law Institute's Restatement, The Foreign Relations Law of the United States, § 190 (a) (Proposed Official Draft, 1962).

American Branch of the International Law Association 61, 67-68 (1957-1958). The American Law Institute's Restatement, The Foreign Relations Law of the United States (Proposed Official Draft, 1962), states in section 205:

> "When an alien is injured by conduct attributable to a state for which the state would otherwise be responsible under international law, the state is not excused from responsibility merely because its conduct is in retaliation against conduct of the state of the alien's nationality, even if the conduct of the second state is wrongful under international law. * * *"

That Restatement thus illustrates the rule of section 205:

> "States A and B are parties to an international agreement regulating commerce between the two states. A raises its tariff on imports from B in violation of the agreement. B thereupon expropriates the property of nationals of A and announces that no compensation will be paid until the tariff is reduced. B is responsible under the rule stated in § 190 [that state takings of alien property are wrongful under international law when done not for a public purpose, or when unaccompanied by provision for payment of just compensation]."

The principle that political reprisal is not a valid public purpose which might justify the expropriation of alien property was recently invoked by the Netherlands in its dispute with Indonesia concerning Indonesian nationalization measures which affected only Dutch-owned property and enterprises in Indonesia. It was the position of the Netherlands government that the real motive underlying the Indonesian nationalizations was to bring pressure upon the Netherlands to transfer sovereignty in respect of West Irian to Indonesia. Netherlands Note to

Indonesia, Dec. 18, 1959, regarding Nationalization of Dutch-Owned Enterprises, in 54 Am. J. Int'l L. 484, 485 (1960). See McNair, *The Seizure of Property and Enterprises in Indonesia*, 6 Netherlands Int'l L. Rev. 218, 247 (1959).

The Court of Appeal of Amsterdam in *Bank Indonesia v. Senembah Maatschappij and Twentsche Bank*, Hof, Amsterdam, June 4, 1959, 7 Netherlands Int'l L. Rev. 400, 401 (1960), *affirming* District Court, Amsterdam, Dec. 22, 1958, *id.* at 285, found the Indonesian measures to be in violation of international law because, *inter alia*, their purpose was "to attain purely political ends unconnected with the measures being taken." But see *N. V. Verenigde Deli-Maatschapijen v. Deutsch-Indonesische Tabak-Handelsgesellschaft*, Bremen Oberlandesgericht, Aug. 21, 1959, in 54 Am. J. Int'l L. 305 (1960), in which the Court of Appeals of Bremen found that the Indonesian nationalization was not in fact an act of political retaliation.

The government of the United States has expressly stated in a note to Cuba that Law No. 851, with which we are here concerned, is "manifestly in violation of those principles of international law which have long been accepted by the free countries of the West," for the reason, among others, that the law "was admittedly enacted in retaliation for recent actions taken by the Congress and President of the United States. . . ." The United States Ambassador to Cuba, to the Cuban Ministry of Foreign Relations, July 16, 1960, 43 Dep't State Bull. 171 (1960).

b. The expropriation decree was wrongfully discriminatory.

The rule is well established in international law that in expropriating property a State must not unreasonably discriminate against foreigners as such or against aliens of a particular nationality. It is clear from international jurisprudence, diplomatic correspondence, and doctrine that equal treatment of aliens and nationals in the matter of takings is *essential* under public international law.

The tribunal in the *Norwegian Shipowners' Claims* (*Norway* v. *United States*), 1 U. N. Rep. Int'l Arb. Awards 307 (1922), noting that "the Norwegian claimants are entitled . . . to the perfect equality of treatment which is provided for them under the Constitution of the United States," observed specially that in the months after the end of World War I the United States had returned to their former owners a large number of ships requisitioned for use during the war, but had not returned nor paid compensation for requisitioned ships which were the property of the Norwegian claimants. The tribunal held:

> "The United States are responsible for having thus made a discriminating use of the power of eminent domain towards citizens of a friendly nation, and they are liable for the damaging action of their . . . agents towards these citizens . . . of Norway." (*Id.* at 339.)

The rule of non-discrimination between nationals and aliens and between foreigners of particular nationalities in the protection of their property rights is embodied in "national treatment" and "most favored nation" clauses of a great number of treaties.[3] These treaty provisions

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[3] *E.g.*, article VI, paragraph 5, of the Treaty of Friendship, Commerce, and Navigation between the United States and Nicaragua, Jan. 21, 1956, 9 U.S.T. 449, 454:

"Nationals and companies of either Party shall in no case be accorded, within the territories of the other Party, less than national treatment and most-favored-nation treatment with re-

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for non-discriminatory treatment of alien property rights are undoubtedly declaratory of customary international law. Fitzmaurice, now a Judge of the International Court of Justice, in dealing with the clauses in the 1947 Peace Treaties establishing the conditions under which general economic relations between the Allies and their former enemies were to be resumed, says:

> "It has long been recognized that in certain matters, e.g. the general treatment of foreigners in a country or compensation for property which may be expropriated or nationalised, non-discrimination as between persons of different nationality, or against foreigners as compared with persons of local nationality, amounts to a rule of international law, the breach of which gives rise to a valid ground of claim on the part of the foreign Government whose national is involved." Fitzmaurice, *The Juridical Clauses of the Peace Treaties*, 73 Recueil des Cours de l'Académie de Droit International de la Haye 259, 349 (1948).

In diplomatic correspondence States have protested as in violation of international law the singling out for expropriation of the property of their nationals alone, with

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spect to the matters set forth in paragraphs 2 and 4 of the present Article [guarantees against illegal molestation and expropriation without prompt and just compensation in an effectively realizable form]. Moreover, enterprises in which nationals and companies of either Party have a substantial interest shall be accorded, within the territories of the other Party, not less than national treatment and most-favored-nation treatment in all matters relating to the taking of privately owned enterprises into public ownership and to the placing of such enterprises under public control."

Some post-war compensation agreements specifically refer to the principle of non-discrimination, *e.g.*, article 7 of the Agreement between the United Kingdom and Poland relating to Money and Property Subjected to Special Measures since 1 September 1939, Jan. 14, 1949, 83 U.N.T.S. 51, which begins: "Subject to the right of either Government on a basis of complete non-discrimination to nationalise property on payment of adequate and effective compensation. . . ."

preferential treatment being accorded the property of citizens of the expropriating State or of foreigners of other countries.[4]

Writers of all political and economic persuasions have emphasized that non-discrimination in the treatment of the property of aliens as against that of nationals or citizens of other States is a requirement of public international law.[5]

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[4] On July 16, 1960 and August 8, 1960 the United States informed the government of Cuba that it considered the very decrees here being considered as "manifestly in violation of those principles of international law which have long been accepted by the free countries of the West," because, among other reasons, "[t]he Nationalization Law is discriminatory in that it is specifically limited in its application to the seizure of property owned by nationals of the United States." 43 Dep't State Bull. 171, 316 (1960).

Post-war nationalization legislation in Rumania, Bulgaria, and Hungary in many instances exempted from expropriation Soviet-owned property but not other alien-owned property. In a note of September 7, 1948 the United States protested to the Rumanian government against this differential treatment in the following terms:

> "While the United States Government has consistently recognized the right of a sovereign power to expropriate property subject to its jurisdiction and belonging to American nationals, the United States has likewise refused to recognize the validity of such expropriations in cases where they are discriminatory by nature and effect. . . ." 19 Dep't State Bull. 408 (1948).

[5] See, *e.g.*, Freeman, The International Responsibility of States for Denial of Justice 517 (1938); Friedman, Expropriation in International Law 189-93 (1953); Foighel, Nationalization 46-48 (1957); 1 Guggenheim, Traité de droit international public 330 (1953); White, Nationalisation of Foreign Property 5, 119-44 (1961); Brierly, *Règles générales du droit de la paix*, 58 Recueil des Cours de l'Académie de Droit International de la Haye 5, 171 (1936); Bystricky, *Foreign Reactions to Nationalisation Measures*, in Int'l Ass'n of Democratic Lawyers, Study Circle on Nationalisation, Rome, May 4-5, 1957, at 42, 44, 60 (1957); Fachiri, *Expropriation and International Law*, 6 Brit. Yb. Int'l L. 159 (1925); Williams, *International Law and the Property of Aliens*, 9 *id.* 1, 28 (1928); Herz, *Expropriation of Foreign Property*, 35 Am. J.

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II. The expropriation decree violated international law because it expropriated the property of foreign nationals without payment or provision for just compensation.

Both the District Court and the Court of Appeals found that the Cuban decrees under which C.A.V.'s property was seized made patently inadequate provision for the payment of compensation to expropriated American property owners. The sham compensation formula contained in Law No. 851 was deliberately designed to produce no compensation at all.

As the Court of Appeals found that the Cuban seizure was retaliatory and discriminatory, as well as confiscatory, it found unnecessary to its decision resolution of the question whether a government's failure to pay adequate compensation for expropriated foreign property is in and of itself a breach of international law. But the District Court, having decided that the specific expropriation of C.A.V.'s property was a discriminatory taking directed against designated American-owned enterprises, and, furthermore, a taking carried out as an act of reprisal against the United States rather than to an end reasonably related to a public purpose involving the use of such property, also decided that Cuba's expropriation of C.A.V.'s property violated international law in a third respect—the nationalization measures did not provide adequate compensation.

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Int'l L. 243, 249 (1941); opinions by McNair, Rolin, and Verdross in 6 Netherlands Int'l L. Rev. 218, 247-49, 260, 269-70, 278, 284-85 (1959); Sohn, *Remarks at the 1959 Meeting of the American Branch of the International Law Association*, Proceedings 1959-1960, 31 (1960); Van Hecke, *Confiscation, Expropriation and the Conflict of Laws*, 4 Int'l L. Q. 345 (1951). The rule of non-discrimination is incorporated in the American Law Institute's Restatement, The Foreign Relations Law of the United States (Proposed Official Draft, 1962), as § 170.

This Court could well affirm the holding of the Court of Appeals that the Cuban expropriation decree violated international law on the narrower grounds there stated. However, the American Bar Association would respectfully urge that the Court resolve the international law question presented in this case primarily, or at least alternatively, on the ground that State takings of alien property which are not accompanied by, or do not provide for, just compensation are wrongful under international law. To avoid this ground of decision when the facts of the case so clearly invoke it, might well be taken as an indication of the Court's uncertainty as to the principle itself, and be grist for the mill of those who seek to undermine its vitality.

This principle which the Association urges the Court to join the District Court in upholding is well stated in the American Law Institute's Restatement of the Foreign Relations Law of the United States in the following terms: "The taking by a state of property of an alien is wrongful under international law if . . . it is not accompanied by payment of just compensation or, under the law and practice of the state in effect at the time of taking, there is not reasonable provision for the determination and payment of just compensation. . . ." (§ 190, Proposed Official Draft, 1962.) "Just compensation" is there defined as compensation which is adequate in amount, paid with reasonable promptness and paid in a form that is effectively realizable by the alien (§ 192).

This principle has been consistently espoused by the United States government in its diplomatic negotiations with other governments. Secretary of State Hull's classic statement of the necessity for "prompt, adequate and effective" compensation is set forth in [1938] 5 Foreign Rel. U. S. 685, 687:

> "The Government of the United States merely adverts to a self-evident fact when it notes that the

applicable precedents and recognized authorities on international law support its declaration that, under every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate, and effective payment therefor. In addition, clauses appearing in the constitutions of almost all nations today, and in particular in the constitutions of the American republics, embody the principle of just compensation. These, in themselves, are declaratory of the like principle in the law of nations.

"The universal acceptance of this rule of the law of nations, which, in truth, is merely a statement of common justice and fair-dealing, does not in the view of this Government admit of any divergence of opinion."

Moreover, this principle has been incorporated in recent United States treaties of friendship, commerce and navigation. Thus article VI, paragraph 3, of the 1953 Treaty of Friendship, Commerce, and Navigation between the United States and Japan provides that: "Property of nationals and companies of either Party shall not be taken within the territories of the other Party . . . without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at, or prior to the time of taking for the determination and payment thereof." 206 U.N.T.S. 143, 4 U.S.T. 2063. See also article 10 of the Harvard Law School Draft Convention on The International Responsibility of States for Injuries to Aliens. (Draft No. 12, 1961, reprinted in Sohn & Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 Am. J. Int'l L. 545, 553 (1961).)

It has been held in a large number of international arbitral decisions[6] that just compensation must be paid by States which make specific expropriations of alien property, even when the takings are done in good faith for a valid public purpose. There are as well numerous instances in which States of widely differing economic and political persuasions have paid compensation for alien property taken in the course of general nationalizations. See Appendix.

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[6] *De Sabla* (United States v. Panama), 6 U. N. Rep. Int'l Arb. Awards 358 (1933) ("It is axiomatic that acts of a government in depriving an alien of his property without compensation impose international responsibility."); *Upton* (United States v. Venezuela), 9 *id.* 234 (1903) ("The right of the state, under the stress of necessity, to appropriate private property for public use is unquestioned, but always with the corresponding obligation to make just compensation to the owner thereof."); *The Montijo* (United States v. Colombia), 2 Moore, International Arbitrations 1421 (1875); *De Garmendia* (United States v. Venezuela), 9 U. N. Rep. Int'l Arb. Awards 122 (1903); *West India Oil Co.* (United States v. Spain), Spanish Treaty Claims Comm'n, Fuller's Report 65 (1907); *Pieri Dominique & Co.* (France v. Venezuela), 10 U. N. Rep. Int'l Arb. Awards 139 (1905); *Melczer Mining Co.* (United States v. Mexico), 4 *id.* 481 (1929); *Great Venezuelan Railroad* (Germany v. Venezuela), 10 *id.* 468 (1903); *Ashmore Fishery Case* (United States v. China), 2 Moore, International Arbitrations 1857 (1884); *Evertsz* (Netherlands v. Venezuela), 10 U. N. Rep. Int'l Arb. Awards 721 (1903); *Mazzei* (Italy v. Venezuela), *id.* at 525 (1903). Some cases have concerned the well-established liability of a belligerent State to pay compensation for the use of neutral property requisitioned or taken by right of angary. In *Goldenberg* (Rumania v. Germany), 2 *id.* 901 (1928), the claimant had been paid compensation amounting to one-sixth of the value of the goods requisitioned. The arbitral tribunal held that the formal allowance of a notoriously insufficient indemnity did not satisfy the requirements of international law. See also *Hatton* (United States v. Mexico), 4 *id.* 329 (1928) ("It is unnecessary to cite legal authority in support of the statement that an alien in the situation of the claimant is entitled under international law to compensation for requisitioned property."). Some international arbitrations have been concerned only with the amount of indemnity due to the alien on account of a State taking of his property; the respondent State did not contest the existence of a duty to pay compensation in the circumstances. *E.g.*, *Delagoa Bay Railway* (United States and Great

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Petitioner would invoke the opinions of a few writers[7] that the rigorous standard of "prompt, adequate, and effective" compensation should be relaxed in cases of general nationalizations, in order to justify a Cuban seizure of specific American-owned property and that property only. (Brief for Petitioner, pp. 45-48). But in spite of the opinions of those writers on what international law *should* be and there is strong doctrinal opinion to the contrary,[8] the fact is that many countries have, and often at some sacrifice,

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Britain v. Portugal), 2 Moore, International Arbitrations 1865, La Fontaine, Pasicrisie Internationale 397 (1900); *Affaire des Propriétés Religieuses* (Great Britain, France and Spain v. Portugal), 1 U. N. Rep. Int'l Arb. Awards 7 (1929); *The Norwegian Shipowners' Claims* (Norway v. United States), 1 *id.* 307 (1922); *British Claims in the Spanish Zone of Morocco*, 2 *id.* 615 (1925); *Portuguese-German Arbitration of June 30, 1930*, 2 *id.* 1035 (1930).

There is also dicta in other international arbitrations about the requirement of compensation for expropriation of property, where claims were allowed or disallowed on other grounds. Most often cited is the language in *Factory at Chorzów (Merits)*, P.C.I.J., Ser. A, No. 17, at 46-47 (1928), that:

> "The action of Poland which the Court had judged to be contrary to the Geneva Convention is not an expropriation—to render which lawful only the payment of fair compensation would have been wanting. . . .
>
> "It follows that the compensation due to the German Government is not necessarily limited to the value of the undertaking at the moment of dispossession, plus interest to the day of payment. This limitation would only be admissible if the Polish Government had had the right to expropriate, and if its wrongful act consisted merely in not having paid to the two Companies the just price of what was expropriated. . . ."

[7] Williams, *International Law and the Property of Aliens*, 9 Brit. Yb. Int'l L. 1 (1928); Friedman, Expropriation in International Law 206, 207 (1953); Baade, *Indonesian Nationalization Measures Before Foreign Courts—A Reply*, 54 Am. J. Int'l L. 801, 803, 804 (1960); Dawson & Weston, *Prompt, Adequate and Effective—A Universal Standard of Compensation?*, 30 Fordham L. Rev. 727, 757 (1962).

[8] *E.g.*, Fachiri, *Expropriation and International Law*, 6 Brit. Yb. Int'l L. 159 (1925), and *International Law and the Property of Aliens*, 10 *id.* 32 (1929); Dupuis, *Le différend roumano-hongrois au Conseil de la Société des Nations en septembre 1927*, 1 Rev.

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made compensation to expropriated foreign property owners for State takings done pursuant to a general program of social and economic reform.

By the end of the First World War there was a substantial consensus among governments that in customary international law full compensation is due even in cases of general expropriation. This consensus is evidenced by the diplomatic protests presented when, in 1917 and afterwards, Soviet Russian decrees ordered the confiscation of alien property rights. On February 13, 1918, the diplomatic representatives at Petrograd of the United States, Japan, France, Spain, Italy, England, Sweden, Switzerland, the Netherlands, Belgium, Persia, Denmark, Norway, Siam, China, Serbia, Portugal, Brazil, Argentina, and Greece declared to the Soviet Foreign Ministry that they considered "the decrees regarding the repudiation of

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de Droit Int'l 893 (1927); Deák, The Hungarian-Rumanian Land Dispute 114-27 (1928); Bullington, *Treatment of Private Property of Aliens on Land in Time of Peace*, [1933] Proceedings Am. Soc'y Int'l L. 103; Hyde, *Confiscatory Expropriation*, 32 Am. J. Int'l L. 759 (1938); 1 Hyde, International Law 710-22 (2d rev. ed. 1945); 1 Podestá Costa, Derecho Internacional Público 469-70 (3d ed. 1955); White, Nationalisation of Foreign Property 232-35 (1961); Wortley, Expropriation in Public International Law 157-58 (1959); Foighel, Nationalization 85-87 (1957); Verdross, Völkerrecht 289-90 (4th ed. 1959); Viénot, Nationalisations étrangères et intérêts français 38 (1953); Bindschedler, *La protection de la propriété privée en droit international public*, 90 Recueil des Cours de l'Académie de Droit International de la Haye 173 (1956); Becker, *Just Compensation in Expropriation Cases: Decline and Partial Recovery*, [1959] Proceedings Am. Soc'y Int'l L. 336; Domke, *Foreign Nationalizations*, 55 Am. J. Int'l L. 585, 604-10 (1961). In 1958 the International Law Association adopted a resolution declaring that the principles of international law establishing the sanctity of a State's undertakings and respect for the acquired rights of aliens requires:

> "payment of such full compensation to the alien . . . as may be determined by agreement between the State and the alien or, in the event of dispute, by an international authority possessing competence or jurisdiction in the matter." Int'l L. Ass'n, Report of the 48th Conference, New York, at 161 (1959).

Russian state loans, the confiscating of property of all kinds and other analogous measures as without value as far as their nationals are concerned." [1918] (Russia III) Foreign Rel. U. S. 33. See also 1 McNair, International Law Opinions 9 (1956), reporting passages from a letter sent to the Soviet government by delegates to the international conference on Russia held at Brussels in October, 1921:

> "The forcible expropriations and nationalisation without any compensation or remuneration of property in which foreigners are interested is totally at variance with the practice of civilized States. Where such expropriation has taken place, a claim arises for compensation against the Government of the country."

The Soviet Union insisted then as now that there exists no international obligation to compensate foreigners for property thus expropriated, unless States have by treaty agreed to do so. See Sack, *Les réclamations diplomatiques contre les Soviets (1918-1938)*, 20 (3d ser.) Rev. de droit int'l et leg. comp. 5, 286 (1939). In several instances, however, the U.S.S.R. has agreed with capitalist States or their nationals to make indemnity for the expropriation of private property rights.[9]

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[9] In 1934 the Soviet government gave notes for three million pounds, payable over a period of twenty years, to the Lena Goldfields Company on account of the cancellation of its concession in Russia, and made payment on these notes until May, 1940. See Nussbaum, *The Arbitration Between the Lena Goldfields Ltd. and the Soviet Government*, 36 Cornell L. Q. 31, 36 (1950). In agreements with Sweden of May 30, 1941 and October 7, 1946 the U.S.S.R. made a lump-sum compensation settlement of Swedish claims concerning property in the Baltic states. See N. Y. Times, Nov. 24, 1946, § 3, p. 1, col. 8; Foighel, Nationalization 79, 97, 127 (1957). In 1944 the U.S.S.R. agreed to pay twenty million dollars to Canada for the Soviet seizure of the Petsamo nickel mines in Finnish territory annexed by the Soviet Union. See Bindschedler, *La protection de la propriété privée en droit international public*, 90 Recueil des Cours de l'Académie de Droit International de la Haye 173, 193 (1956).

Post-World War II domestic legislation in many countries has authorized State takings of private property on a scale theretofore rarely paralleled. However, not only countries with private-enterprise economies but also many socialist States and those with mixed or predominantly nationalized economies have agreed to compensate foreigners even when their own nationals may have received little or no indemnity.[10] Between States at least, controversy about the requirement of compensation for takings even in furtherance of general programs of economic and social reform is concerned rather with the amount, time, and form of payment than with the existence of a duty to pay compensation.

Further confirmation of the recognition even by a number of socialist States that there exists an international obligation to make compensation for the expropriation of foreign property is to be found in the compensation treaties concluded in recent years between socialist countries in respect of their mutual nationalizations. These treaties and their implementing municipal legislation are the subject of articles by Drucker, *On Compensation Treaties Between Communist States*, 229 The Law Times 279 and 293 (1960), and *Compensation Treaties Between Communist States*, 10 Int'l & Comp. L. Q. 238 (1961). Such treaties have been concluded between Yugoslavia and Czechoslovakia, Poland and Czechoslovakia, and the U.S.S.R. and Czechoslovakia.

In light of this overwhelming evidence that in post-World War II practice many States have recognized a liability on the international level to make indemnity for the taking of alien property—even socialist States, which

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[10] Examples of the State practice in compensating foreigners are set forth in the Appendix hereto.

cannot have been motivated by a desire to encourage further investment by aliens, and which have come near to abolishing altogether the institution of private ownership of property in their territories—it must be concluded that the international law requirement of payment of compensation has vitality even in cases of general expropriation.

This is not to say that mere State practice to the contrary, or instances where the compensation does not in full measure satisfy the standard of just compensation, would undermine the rule of just compensation previously established in international custom and international arbitral decisions. For without the acquiescence of the international community, and the United States and many other States have energetically protested threatened departures from this standard, mere usage by itself can not undermine a rule of international law. The fact, however, that even many socialist States have provided compensation for postwar takings of alien property makes manifest the lack of substance in petitioner's extreme position that "there is no right under international law to compensation for nationalized property." (Brief for Petitioner, p. 45.)

Petitioner has also referred (Brief for Petitioner, pp. 49-50) to the United Nations General Assembly's Declaration on "Permanent Sovereignty Over Natural Resources," General Assembly Resolution 1803 (XVII) of December 14, 1962, reprinted in 57 Am. J. Int'l L. 710 (1963). Paragraph 4 of this resolution provides, *inter alia*, that:

> "Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner

shall be paid appropriate compensation, in accordance with the rules in force in the state taking such measures in the exercise of its sovereignty and *in accordance with international law.*". [Emphasis added.]

This resolution was adopted by a vote of 87 in favor, 2 opposed (France and South Africa) and 12 abstentions, comprised of the Communist bloc (including Cuba), Ghana and Burma. In the course of the consideration in committee of this resolution the United States representative, Ambassador Philip M. Klutznick, stated that the United States delegation "was confident that the expression 'appropriate compensation' . . . would be interpreted as meaning under international law, prompt, adequate and effective compensation." U. N. Doc. No. A./C. 2/SR. 850, at 7 (1962). In his letter of December 21, 1962 to the American Bar Association Ambassador Adlai E. Stevenson, the United States Representative to the United Nations, reported that "the United States consistently interpreted 'appropriate' compensation in accordance with international law to equate with 'prompt, adequate and effective' compensation." American Bar Association, Report to the House of Delegates by the Standing Committee on Peace and Law Through the United Nations, Appendix B (February 1963). Stephen M. Schwebel, Legal Adviser to the United States Delegation has further expressed the view that ". . . the force of the United States view that appropriate compensation in accordance with international law means prompt, adequate and effective compensation was enhanced by the General Assembly's treatment of the resolution. Moreover, the terms of that resolution—the owner shall be paid appropriate compensation—when coupled with withdrawal of the Afghan and defeat of the Soviet amendments, make it plain that payment of appropriate compensation is a matter not of discretion but of obligation." Schwebel, *The Story of the U. N.'s Declaration on Permanent Sovereignty Over Natural Resources*, 49 A.B.A.J. 463, 466 (May 1963).

III. The record presents an international law question because United States nationals were substantial stockholders of the injured Cuban corporation.

The petitioner argues that this case involves no international law question because C.A.V. was incorporated in Cuba. (Brief for Petitioner, p. 27.) While the United States at one time would not intervene on behalf of American stockholders in foreign corporations,[11] this no longer represents United States practice[12] or the international law rule, as hereinafter shown.

The American Law Institute's Restatement of the Foreign Relations Law of the United States recognizes a State's responsibility under international law for injury to an alien stockholder of a domestic corporation when the following conditions have been met:

> "(a) a significant portion of the stock of the corporation is owned by the alien or other aliens of whatever nationality,
>
> "(b) the state knows or has reason to know of such ownership at the time of the conduct causing the injury to the corporation,
>
> "(c) the corporation fails to obtain reparation for the injury and
>
> "(d) such failure is due to causes over which the alien or other alien shareholders cannot exercise control." (§ 180, Proposed Official Draft, 1962.) See also Article 20 of Harvard Law School Convention on the International Responsibility of States for Injuries to Aliens, Draft No. 12, 1961, reprinted in Sohn & Baxter, *Responsibility of States for Injuries to the Eco-*

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[11] See U. S. Secretary of State Seward to the U. S. Minister to Colombia, April 27, 1866, 6 Moore, Digest of International Law 644 (1906).

[12] See correspondence between the United States and Great Britain, 1924-1928, regarding the claim of an American corporation for compensation for the destruction of property belonging to its wholly-owned subsidiary, Romano-Americana, a Rumanian corporation, 5 Hackworth, Digest of International Law 840-44 (1943).

nomic Interests of Aliens, 55 Am. J. Int'l L. 545, 577 (1961).

The facts of this case clearly meet all the conditions set forth in the Restatement for invoking Cuba's international responsibility. The decision of the Court of Appeals recites that "over ninety per cent of C.A.V.'s shareholders were United States nationals!". Cuban Resolution No. 1 of August 6, 1960, itself acknowledges the "predominating interest" of United States nationals in C.A.V. The provision of Cuban Law No. 851 making expropriation resolutions thereunder non-appealable and prohibiting any remedial action clearly meets the Restatement's condition that the corporation's failure to obtain relief be due to causes over which it had no control. (See § 180, Comment d, Proposed Official Draft, 1962.)

The provisions of international arbitration agreements and decisions thereunder support the Restatement's enunciation of the law.[13] A number of general treaties contain similar provisions. The Treaty of Versailles, article 297e, states: "The nationals of Allied and Associated Powers

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[13] In the *Ruden & Co.* arbitration pursuant to the Claims Convention of 1868 between the United States and Peru, the Commission held that it could entertain the claim of Ruden, a United States national, arising from his interest in the company even though the company might have Peruvian nationality, and indemnity was ordered for the claimant on this account. *Ruden & Co.* (United States v. Peru), 2 Moore, International Arbitrations 1653 (1898). In the *Delagoa Bay Railway* case the United States espoused the interests of American stockholders in a corporation organized under the laws of Portugal and the arbitration agreement recognized Portugal's international liability based upon the nationalization of a Portuguese corporation. *Delagoa Bay Railway* (United States and Great Britain v. Portugal), 2 Moore, International Arbitrations 1865, La Fontaine, Pasicrisie Internationale 397 (1900). In *El Triunfo* (United States v. Salvador), [1902] Foreign Rel. U. S. 859, 873 (1902), the decision stated the following:

> "We have not discussed the question of the right of the United States under international law to make reclamation for these shareholders in El Triunfo Company, a domestic corporation of Salvador, for the reason that the question of such right is fully settled by the conclusions reached in the frequently cited and well-understood Delagoa Bay Railway Arbitration."

shall be entitled to compensation with respect to damage or injury inflicted upon their property, rights and interests, including any corporation or association in which they are interested." S. Doc. No. 51, 66th Cong., 1st Sess. (1919). The mixed commissions sitting by virtue of the Versailles Treaty rendered many decisions involving corporations formed in Germany and controlled by nationals of the Allied and Associated Powers. The right to compensation for injury was determined generally according to the nationality of the interests controlling the corporations and not according to the law under which the corporations were constituted. Ralston, The Law and Procedure of International Tribunals 155 (rev. ed. 1926). The peace treaties with the Axis Satellite countries concluded on February 10, 1947 also provided for compensation of claims of United Nations nationals with ownership interests in former enemy and other corporations.[14]

The same principle of protecting shareholders' interests when injury to foreign corporate property is involved, appears also in the various recent compensation treaties. *E.g.*, the United States-Yugoslav Treaty of July 19, 1948, 89 U.N.T.S. 43, 62 Stat. 2658.

Friedman, cited by petitioner in other contexts (Brief for Petitioner, p. 46), states:

> "International law has not allowed itself to be unduly hampered by legal fictions but has, generally speaking, only considered the realities of a situation. International law only takes account of the real nationality of the physical persons covered by the legal fiction of corporate personality, since such physical

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[14] Treaty of Peace with Italy, 50 U.N.T.S. 61 Stat. 1245; with Rumania, 42 U.N.T.S. 3, 61 Stat. 1757; with Bulgaria, 41 U.N.T.S. 21, 61 Stat. 1915; with Hungary, 41 U.N.T.S. 135, 61 Stat. 2065. See Fitzmaurice, *The Juridical Clauses of the Peace Treaties*, 73 Recueil des Cours de l'Académie de Droit International de la Haye 259, 329-30 (1948).

persons alone possess any importance as nationals of a State. As Professor Borchard rightly points out: 'the company is simply a form of organisation, a veritable cloak, which allows individuals to enjoy their property, and an injury inflicted upon this form as such is a pure fiction.'" Friedman, Expropriation in International Law, 171 (1953).

Conclusion

The Court should hold that the action of the Government of Cuba in expropriating the properties in Cuba of C.A.V. (a Cuban corporation in which United States nationals had a dominant interest) violated international law because of (1) the failure to provide just compensation; and (2) discrimination against United States nationals for a retaliatory purpose.

Respectfully submitted,

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September 30, 1963.

APPENDIX

In France, the 1946 law that nationalized gas and electricity undertakings distinguished between French nationals and foreigners in the matter of compensation, the latter to be more favorably treated, particularly in that they were not to be affected by the depreciation of the franc. On this account, France has concluded compensation agreements with Belgium on February 18, 1949, 31 U.N.T.S. 173, and April 12, 1950, 73 *id.* 257; with Switzerland on November 21, 1949, [1949] Recueil Officiel 1953 (Swit.); with the United Kingdom on April 11, 1951, 106 U.N.T.S. 3; and with Canada on January 26, 1951, 223 *id.* 65. See Friedman, Expropriation in International Law 57-63 (1953); White, Nationalisation of Foreign Property 204-05 (1961).

When British-owned railways in Argentina and Uruguay were nationalized in 1947 and 1948, compensation was paid pursuant to agreements of sale with the United Kingdom, Cmd. No. 7405 (T. S. No. 27 of 1948); Cmd. No. 7629 (T. S. No. 16 of 1949).

The Iranian Oil Nationalization Law of 1951 provided that the expropriation of oil properties in Iran was to be against compensation. The United Kingdom on behalf of its national, the Anglo-Iranian Oil Company, argued at length in diplomatic correspondence with Iran and before the International Court of Justice that the property and concession expropriation was in itself internationally wrongful because in alleged breach of treaty, and that the compensation promised would be neither prompt nor adequate. In 1954 the dispute was settled by the signature of a compensation agreement between Iran, the National Iranian Oil Company, and Anglo-Iranian providing for installment payments of a lump sum indemnity. In addition, by virtue of a private consortium agreement, the British company was to retain a forty per cent interest in the operation of the oil industry in Iran thereafter to be carried on by a consortium of oil companies, and it was to receive payment for the right to the other sixty

per cent share from the other members of the consortium. See Ford, The Anglo-Iranian Oil Dispute (1954); White, *supra*, at 227-28.

Compensation for the nationalization of the Suez Canal Company under the Egyptian Law of July 26, 1956 was settled by direct agreement between the United Arab Republic and the Company in 1958, after lengthy negotiations in which the International Bank for Reconstruction and Development played an important part. The Company accepted in full and final settlement of claims of the shareholders external assets and a lump sum indemnity, part of which was to be paid in installments. The text of the 1958 agreement is printed in 54 Am. J. Int'l L. 493 (1960).

Bulgaria has concluded global compensation agreements with Switzerland, on November 26, 1954, [1955] Recueil Officiel 521 (Swit.), France, on July 28, 1955, [1959] Journal Officiel 2742 (Fr.), the United Kingdom, on September 23, 1955, 222 U.N.T.S. 347, and Norway, on December 2, 1955, see Foighel, Nationalization 80, 131 (1957), and the United States, on July 2, 1963, 49 Dep't State Bull. 138 (1963).

Czechoslovakia has concluded compensation agreements with the Netherlands, Nov. 4, 1949, 155 Brit. & Foreign State Papers 292 (1949); with France, June 2, 1950, [1951] Journal Officiel 11188 (Fr.), and June 6, 1956, [1959] *id.* 5379; with Sweden, December 22, 1956, [1957] Sveriges överskommelser 433; with Switzerland, December 22, 1949, [1950] Recueil Officiel 21 (Swit.); and with the United Kingdom, September 28, 1949, 86 U.N.T.S. 161.

Hungary has concluded lump-sum indemnity agreements with France, June 12, 1950, [1952] Journal Officiel 9260 (Fr.); Switzerland, July 19, 1950, [1950] Recueil Officiel 735 (Swit.); Sweden, March 31, 1951, [1951] Sveriges överskommelser 145; Belgium and Luxembourg, February 1, 1955, see White, *supra*, at 225-26; the United Kingdom,

June 27, 1956, Cmd. No. 9820 (T. S. No. 30 of 1946); and Norway, February 22, 1957, see U. N. Secretariat, *Revised Study on the Status of Permanent Sovereignty Over Natural Wealth and Resources*, U. N. Doc. No. A/AC.97/5/Rev. 1, at 198 (1960).

Poland has concluded lump-sum settlements with Belgium, February, 1948, see Friedman, *supra*, at 38-39; with Sweden, November 16, 1949, [1950] Sveriges överskommelser 921; Denmark, February 26, 1953, 186 U.N.T.S. 301; the United Kingdom, November 11, 1954, 204 U.N.T.S. 137; Switzerland, June 25, 1949, [1949] Recueil Officiel 839 (Swit.); France, March 19, 1948, 152 Brit. & Foreign State Papers 369 (1948), and September 7, 1951, [1957] Journal officiel 7779 (Fr.); Norway, on December 23, 1955, [1955] Stortinget proposisjon No. 103 (Nor.); and with the United States, July 16, 1960, 11 U.S.T. 1953. See Rode, *American-Polish Claims Agreement of 1960*, 55 Am. J. Int'l L. 452 (1961).

Rumania has concluded lump-sum compensation agreements respecting the expropriation claims of foreign nationals with four countries: Switzerland, August 3, 1951, [1951] Recueil Officiel 832 (Swit.); France, February 9, 1959, [1959] Journal Officiel 3287 (Fr.); the United States, March 30, 1960, 11 U.S.T. 317; and the United Kingdom, November 10, 1960, Cmd. No. 1232 (T. S. No. 82 of 1960).

Yugoslavia has signed compensation agreements establishing mixed commissions to examine individual claims and to fix the amount of compensation due, with Italy, May 23, 1949, 150 U.N.T.S. 197, and with Turkey, January 5, 1950 (see White, *supra*, at 196), and lump-sum settlements with Sweden, April 12, 1947 (see Foighel, *supra*, at 97, 128); the United States, July 19, 1948, 89 U.N.T.S. 43, 62 Stat. 2658; Switzerland, September 27, 1948, [1948] Recueil Officiel 995 (Swit.); the United Kingdom, December 23, 1948, 81 U.N.T.S. 121, Dec. 26, 1949, 87 *id.* 402; and France, April 14, 1951, [1953] Journal Officiel 6723, Aug. 2, 1958, [1959] *id.* 5244 (Fr.).